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SUPREME COURT OF THE STATE OF WASHINGTON

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HAJRUDIN KUSTURA, GORDANA LUKIĆ, MAIDA MEMIŠEVIĆ,  
ENVER MEŠTROVAC, IVAN FERENČAK, EMIRA RESULOVIĆ,  
and FERID MAŠIĆ

Consolidated Petitioners,

v.

DEPARTMENT OF LABOR & INDUSTRIES and  
BOARD OF INDUSTRIAL INSURANCE APPEALS,

Consolidated Respondents.

PETITIONERS' SUPPLEMENTAL BRIEF

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Consolidated Appellants

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## I. INTRODUCTION

This Court granted discretionary review of five Court of Appeals decisions on five appeals by seven non-English-speaking<sup>1</sup> workers concerning their benefits under the Industrial Insurance Act [the Act].<sup>2</sup> This Court consolidated all these cases under the number assigned to the petition in *Kustura, et al. v. Dep't of Labor & Indus.*<sup>3</sup>

## II. SCOPE AND PURPOSE OF SUPPLEMENTAL BRIEF

Review was granted on what “interpreter services” the Department of Labor & Industries [Department] and by the Board of Industrial Insurance Appeals [Board] must provide to LEP workers under the Act.

The brief’s purpose is to state succinctly the facts, law, and public policy on interpreter services for LEP beneficiaries under the Act.

## III. FACTS PERTINENT TO INTERPRETER SERVICES

### A. PETITIONERS’ BASIC INFORMATION.

All petitioners came to and reside lawfully in this country. All lack English proficiency.<sup>4</sup> All were injured on their jobs<sup>5</sup> entitling them to

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<sup>1</sup> Hereinafter LEP is used. This term means having limited English proficiency.

<sup>2</sup> Three opinions were published: *Kustura, et al. v. Dep't Labor & Indus.*, 142 Wn. App. 655, 175 P.3d 1117 (2008) (Hajrudin Kustura, Gordana Lukić, and Maida Memišević); *Meštrovac v. Dep't Labor & Indus.*, 142 Wn. App. 693 (2008) (Enver Meštrovac); and *Ferenčak v. Dep't Labor & Indus.*, 142 Wn. App. 713 (2008) (Ivan Ferenčak). Two opinions were unpublished: *Resulović v. Dep't of Labor & Indus. (No. 59614-4-I)* (Emira Resulović) and *Mašić v. Dep't of Labor & Indus. (No. 81759-6)* (Ferid Mašić).

<sup>3</sup> Upon granting review, this Court consolidated *Meštrovac* No. 81480-5, *Ferenčak* No. 81481-3, *Resulović* No. 81758-5, and *Mašić* No. 81759-6 with *Kustura* No. 81478-3.

<sup>4</sup> Ferenčak, Lukić, Mašić, Memišević, and Resulović have been sworn in as US Citizens. Meštrovac and Kustura have almost completed their naturalization requirements.

<sup>5</sup> None of their jobs required English fluency: Ferenčak was a machine operator; Kustura & Memišević were janitors; Lukić was a housekeeper; Meštrovac unloaded shipping containers by hand; Mašić was a laborer; Resulović packed boxes for shipping.

benefits under the Act.<sup>6</sup> All advised the Department of their LEP status, requesting the Department to provide notices and orders in their native language, Bosnian. They requested interpreter assistance during Department Claim Adjudications and subsequent Board appeals.<sup>7</sup>

## **B. DEPARTMENT ADJUDICATION**

### **1. General Department Practices.**

The Department provided Bosnian interpreters for some, but not all,<sup>8</sup> of petitioners' medical treatment, vocational services, and independent medical examinations. The Department failed to 1) inform any of petitioners of their rights under the Act in Bosnian, 2) provide forms they had to complete in Bosnian, or 3) translate any of their notices and orders into Bosnian, notwithstanding the fact that it sends notices, orders and forms in Spanish to Spanish-speaking workers and assigns them Spanish-fluent Claim Adjudicators.<sup>9</sup> Telephone interpreters were available only use by Department staff whose practice was not to give

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<sup>6</sup> Mašić's & Resulović's appeals were dismissed as untimely, depriving them of hearings on the merits. Thus, Mašić never had a hearing on whether the Department rejected his claim erroneously, despite his employer's non-registration and nonpayment of L&I premiums. Injured workers are covered even if an employer does not pay premiums.

<sup>7</sup> Abbreviations used: RP-Report of Proceedings, BR-Certified Board Record, Ex-Exhibits. Time loss payment orders are issued every 2 weeks. Due to the large number of orders appealed, only examples are provided. Cites to all appealed orders would be excessive, given the page limitation. *Kustura* BR 264-72, 400-4, 425-8, 429-32, 444-52, 465-9, 478-81, 496-501. *Memišević* BR 64-8, 582-6, 636-9, 657-51. *Meštrovac* BR 307-8. *Ferenčak* BR 87-91, 97-100. *Resulović* RP 8/17 14, BR 125-7. *Mašić* 75-81.

<sup>8</sup> Lukić requested, but received no interpreter for medical care. Her UW physician testified this negatively impacted her care. *Lukić* BR 5, 151-6, 165-8, RP 7/1 72-77.

<sup>9</sup> The Department could not identify any Bosnian-fluent Claims Adjudicators. *Memišević* RP 12/11 29-35; 4/5 16-18, 29-40, 91, 98-99, 109, 111; Ex 23, 27. *Lukić* BR 9/29 24, 30; 4/24 64-65, 91. *Resulović* BR 90, 138, RP 8/17 15, 23, 25-26, 34-36.

LEP workers codes needed to use the service. *Resulović* RP 8/17 29-30.

Expert testimony at the Board established that English orders would be “confusing” to a LEP worker who would need help to understand them.<sup>10</sup>

## **2. Department Written Interpreter Services Policies.**

The Department Interpreter Services Policies are appended as **APPENDICES A & B**. “Interpreter services” as used therein includes both oral interpretation and written translation of communication and information on an LEP worker’s injury, claim. Both policies list as non-covered services: 1) all communications on denied/closed claims, 2) setting medical care appointments, 3) document translation requested by a worker, and 4) communications with lawyers and lay legal representatives. APP A p. 8, APP B p.7 These policies effectively shift those significant interpreter costs to petitioners, reducing their benefits under the Act.

## **3. Impact on Petitioners in Department Adjudication.**

During Department adjudication of her claim, Memišević had interpreter costs at \$60 per hour for about 100 hours.<sup>11</sup> None of petitioners were provided interpreters to help establish their claims, forcing all to incur interpreter expenses at the Department level.<sup>12</sup>

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<sup>10</sup> See testimony provided by an ESL educator. *Mašić* RP 10/25 87, 90-92, 96, 98-99.

<sup>11</sup> *Memišević* RP 12/11 87-8, 92-3.

<sup>12</sup> *Kustura*: BR 319-380, 444-8, 465-9, 478-81, 496-500 *Lukić* BR 165-8, 178-212, 213-6; *Memišević* BR 582-6, 563-81; *Lukić* BR 151-60, 165-8, 178-212, 213-6, 221-2, 225-7; *Meštrovac* paid an interpreter to communicate with his employer and his attorney about his injury. *Meštrovac* BR 155-160, 332-42. *Ferenčak* had to hire an interpreter @ \$60/hour to communicate about his claim without which he could not communicate with the Department, his physicians, or his attorney or understand

## **C. BOARD APPEALS**

### **1. Board Response to Requests for Interpreter Services.**

On filing their appeals, all petitioners notified the Board of their LEP status, requesting full interpreter services throughout their appeals. The Board denied all petitioners' requests for interpreter services for discovery, perpetuation depositions, and attorney-client communications both to prepare for and during hearings.<sup>13</sup>

For all petitioners, the Board's orders limited interpreter services to testimony of witnesses taken at the Board, but not perpetuated off Board premises.<sup>14</sup> All petitioners incurred significant interpreter fees during their Board and Court appeals, severely limited by their already impoverished finances. None could communicate fully with counsel either during or to prepare for hearings. The Board denied all requests for reimbursement.<sup>15</sup>

### **2. Impact on Issues on Appeal.**

Meštrovac requested interpreter services in his notice of appeal. His hearings judge initially stated this issue: "Is the Department required to issue orders in the claimant's native language?" Later this judge ruled that the Board lacked jurisdiction on the issue of the language Department orders should be issued in, as it raised constitutional issues and the Board

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Department papers. *Ferenčak* RP 12/5/03 64-66. *Resulović* RP 8/15 18, Ex 1 & 7. *Mašić* BR 75-81, 882-4, 885-900, 1200-1, 1205-18, 1980-2002.

<sup>13</sup> *Lukić* BR 5-8, 11-2; *Memišević* BR 1-2, 4-5; *Meštrovac* BR 237; *Ferenčak* BR 188; *Resulović* BR 1-5; *Mašić* BR 139-40, 282.

<sup>14</sup> See various orders limiting interpreter services *e.g.* *Ferenčak* BR 188-190.

<sup>15</sup> See fn 13, *supra*; *Kustura* BR 13-21; *Meštrovac* BR 1-20, 132-142

never issued an order expressly denying the requested services. *Meštrovac* order at BR 196. Kustura's judge likewise acknowledged interpreter issues, but the Board failed to rule on them. *Kustura* BR 20-1, 303, 313-4.

### **3. Impact on Petitioners in Preparation for Hearings.**

The Board provided no interpreter services for petitioners to confer with counsel or to prepare for their hearings, severely limiting their abilities to 1) prepare for hearings and 2) exercise their right to counsel.<sup>16</sup>

### **4. Impact on Petitioners in Discovery**

The Board provided no interpreter services to allow petitioners to respond to Department discovery, shifting that financial burden to them.

Resulović was ordered to respond on shortened time to Department Requests for Admissions in English on English documents. She was denied reimbursement for the \$180 interpreter cost she incurred to provide those responses. *Resulović* BR 108-20, Ex 1 & 7, RP 7/15.

Mašić's request for reimbursement of \$480 interpreter fees incurred to prepare 12 correction pages for his deposition transcript, riddled with interpreting errors, was denied. Over his objection the same interpreter was hired for the jurisdictional hearing and many interpreting problems arose during the jurisdictional hearing affecting the outcome.<sup>17</sup>

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<sup>16</sup> Even Lukić, whose spouse worked, lacked the money for interpreters to communicate with her lawyer, her doctors, and the Department on her claim. *Lukić* RP 9/29 21-2.

<sup>17</sup> *Mašić* BR 882-901, 1549-51, 1598-1601, RP 10/25 10-1, 13-4, 21-5, 30, 39; 11/9 7-8, 14, 16-24, 176-7, 180-5, 191-6, 218, 223-4. The interpreter first explains Bosnian has

## **5. Impact on Timeliness of Appeals – Inconsistent Rulings.**

The Board rejected the Lukić, Mašić, Memišević, and Resulović appeals as untimely under the 60-day period, notwithstanding that none could understand the English orders sent to them.<sup>18</sup>

Recognizing Ferenčak's right to orders in language he understood, the Department stipulated and the Board found his appeals timely despite being filed over 60 days after receipt because filed "within 60 days of the date on which an interpreter communicated the order to him in terms that he could understand." *Ferenčak* BR 2. Resulović's hearings judge first stated the orders had not been communicated to her, but later found the appeal untimely. *Resulović* RP 8/17 41, BR 1-4, FoF 3-4, CoL 2-3.

After holding prolonged jurisdictional hearings, Mašić's hearings judge found his appeal timely, based on misdelivery and late receipt. *Mašić* RP 11/18 26-27. The judge later reversed his ruling based on a dispositive motion, supported by perjured declarations from Bosnia. Mašić was provided no interpreter services to allow him to respond to this dispositive motion. He incurred considerable interpreter expense to respond to this motion with declarations from Bosnian citizens and government officials proving the declarations false and perjured. *Mašić* BR 1549-1601. The hearings judge set an evidentiary hearing to take

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no words for "claim" or "deposition," words used in many questions posed at deposition & hearings. *Mašić* RP 11/9 20-1, 191.

<sup>18</sup> See e.g. *Lukić* BR 1-16; *Memišević* RP 12/11 29-35, 4/5 16-8, 29-40, 98, 109, 111.

further testimony, but denied Mašić's request for interpreter services and time to cross-examine and to present evidence of witnesses whose declarations he filed in response to the motion. *Mašić* BR 1615-1617.

Without 1) holding an evidentiary hearing, 2) receiving any additional testimony, or 3) allowing any challenge to the declarations by cross examination or presentation of contradicting testimony, the hearings judge reversed the finding of timeliness, dismissing the appeal, despite interpreter problems at jurisdictional hearing. *Mašić* BR 67-71, CoL 2-3.

Despite being situated like Ferencák, the Board applied a different timeliness standard to two other petitioners' appeals also dismissing them. See *Lukić* BR 16 FoF 6, CoL 2 and *Memišević* BR 4-5 FoF 10, CoL 2-3.

#### **6. Limitation on Petitioners' Scope of Testimony**

Kustura and Meštrovac were prevented from testifying on the language barriers they met and any interpreter costs they incurred.<sup>19</sup>

#### **7. Limitation of Petitioners' Right to Retained Counsel and Cross-Examination of Witnesses.**

Petitioners were all limited in the interpreter services provided at hearings. None were allowed to use the interpreter to confer with their counsel, impairing their benefits from retained counsel. Interpreter services were likewise not provided for any testimony admitted at hearing which had been perpetuated by deposition outside Board premises.

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<sup>19</sup> See e.g. *Meštrovac* RP 8/6 19-23.

Much of Kustura's hearings were not interpreted. Only questions posed to him were interpreted so his testimony could appear in the record. Though he hired an interpreter for his hearing, the IAJ would not allow him or "the Board's interpreter" to interpret other witnesses' testimony or the rest of his hearings. *Kustura* RP 9/19 5, 7-8. Kustura's hearing judge held that interpretation of other witnesses' testimony was "not deemed necessary." *Kustura* PD & O BR 71.

Lukić requested full interpretation, but interpretation was not allowed for 1) motions or for 2) extensive "preliminary matters" at her first hearing. *Lukić* RP 2/12/03 11; 4/24/03 1-29, 39; 4/24/03 29-32. As a result, one Bosnian-speaking witness at the first hearing refused to return for the second hearing. *Lukić* RP 8/20 14-15; Order at BR 244. Other petitioners experienced similar limits on interpretation.

When the Superior Court in *Meštrovac* ordered the Department and the Board to reimburse his interpreter expenses, both appealed.

#### **IV. ARGUMENT**

##### **A. INTERPRETER SERVICES ARE TREATED AS BENEFITS UNDER THE ACT.**

RCW 51.12.010 requires the Act be "*liberally construed*" to minimize "*the suffering and economic loss*" from work injuries. The Act must be interpreted with all doubts resolved in the worker's favor. *Cockle v. Dep't Labor & Indus.*, 142 Wn. 2d 801, 811, 16 P. 3d 583 (2001).



Interpreter services is a category of economic loss suffered uniquely by LEP workers because of industrial injury. The Department routinely treats these services as benefits under the Act to *some* LEP workers to ensure they receive benefits for medical care, rehabilitation, time loss, and so they can communicate about their injuries and claims. The Department Interpreter Policy 05-04, p. 2, APPENDIX A, explains why:

### **Why Are Interpreter Services Covered?**

The United States Department of Health and Human Services Office of Civil Rights concluded that inadequate interpretation for [LEP] patients ... is a form of prohibited discrimination on the basis of national origin under Title VI of the Civil Rights Act of 1964...

The Washington Workers' compensation law under RCW 51.04.030(1) requires the provision of prompt and efficient care for injured workers without discrimination or favoritism. Therefore, interpretive services are covered so [LEP] injured workers ... receive prompt and efficient care.

Interpreter fees are paid with Department funds for worker benefits via State disbursement vouchers under RCW 51.44.110. Likewise, Board-provided interpreter services are paid with moneys from the Department's Accident and Medical Aid Funds pursuant to RCW 51.52.030.

### **B. ENGLISH-ONLY NOTICES AND ORDERS DEPRIVE LEP WORKERS OF DUE PROCESS OF LAW.**

All these injured workers had potential rights under the Act, thus triggering due process requirements. *Buffelen Woodworking v. Cook*, 28 Wn.App. 501, 625 P.2d 703 (1981). Fundamental to due process are both written notice and the right to be heard. *Sherman v. Washington*, 128

Wn.2d 164, 184, 905 P.2d 355 (1995). To be meaningful, notice must (1) apprise a party of rights and (2) provide an opportunity to know and meet the opposing party's claims and a reasonable time to prepare and respond. *Cuddy v. Dep't of Public Assistance*, 74 Wn.2d 17, 442 P.2d 617 (1968).

"Unique information about the intended recipient" determines whether a notice is adequate or not. *Jones v. Flowers*, 547 U.S. 220, 126 S.Ct. 1708, 1716 (2006). The Court in *Jones* further stated (at 1715):

[W]hen notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the [intended recipient] might reasonably adopt to accomplish it.

In the present case, written notice of the 60-day time limit for appeal was provided in a language the Department knew these workers could not understand. The English-only orders and notices did not provide notice, but instead actually prevented it. Using English to communicate with those unable to speak English "effectively bars communication itself." *Ruiz v. Hull*, 191 Ariz. 441, 957 P.2d 984 (1998).

Because the Board rejected the Lukić, Mašić, Memišević, and Resulović appeals for failure to appeal Department orders within the time period stated in English orders which they could not read, these workers were denied due process of law. The Court of Appeals' decisions as to these petitioners should therefore be reversed on this ground alone.

**C. ENGLISH-ONLY ORDERS AND NOTICES DEPRIVE LEP WORKERS OF EQUAL PROTECTION OF THE LAW.**

The Department furnishes English orders and notices to all LEP workers, except those fluent only in Spanish. Such a policy places non-Spanish speaking LEP workers at a disadvantage. Because an LEP worker's inability to speak or read English is necessarily linked to his or her national origin, the Department's policy is subject to strict scrutiny.<sup>20</sup> The Court of Appeals disagreed.

Even if the Department's policy is not subject to strict scrutiny, it cannot withstand even the more permissive "rational basis" test. The elements of this test were stated in *Willoughby v. Dep't of Labor & Indus.*, 147 Wn.2d 725, 57 P.3d 611 (2002):

Rational basis tests whether (1) all members of the class created within the statute are treated alike, (2) reasonable grounds exist to justify the exclusion of parties who are not within the class, and (3) the classification created by the statute bears a rational relationship to the legitimate purpose of the statute.

The Department's practice fails at least two of the three parts of the test. First, the class of workers falling under the Department's policy are those who lack English proficiency, yet all members of this class are not treated alike. Spanish-speaking LEP workers are furnished orders and notices in their own language, while other LEP workers are not.

Second, the Department's rationale for its discriminatory policy -- avoiding the added cost of translating orders and notices into Bosnian --

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<sup>20</sup> National origin is a suspect classification. *Andersen v. King County*, 158 Wn.2d 1, 138 P.3d 963 (2006). The link between language and national origin was at the heart of the

has already been found insufficient by this Court.<sup>21</sup> The *Willoughby* Court rejected “cost saving arguments,” holding that “preservation of state funds is not in itself a sufficient ground to defeat an equal protection challenge.” *Willoughby, supra* at 743. The Court of Appeals failed to follow *Willoughby*, instead adopting the cost saving rationale.

**D. THE DEPARTMENT IS REQUIRED BY STATUTE TO PROVIDE LEP WORKERS INTERPRETER SERVICES TO ASSIST THEM DURING THE DEPARTMENT’S CLAIM ADJUDICATION.**

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It is the policy of Washington State to secure the rights of LEP persons by ensuring that qualified interpreters are available to assist them in legal proceedings. RCW 2.43.010 states:

It is hereby declared to be the policy of this state to secure the rights, constitutional or otherwise, of persons who, because of a non-English-speaking cultural background, are unable to readily understand or communicate in the English language, and who consequently cannot be fully protected in legal proceedings unless qualified interpreters are available to assist them.

RCW 2.43.020(3) defines a legal proceeding as follows:

"Legal proceeding" means a proceeding in any court in this state, grand jury hearing, or hearing before an inquiry judge, **or before an administrative** board, commission, **agency**, or licensing body of the state or any political subdivision thereof.

RCW 2.43.040(2) addresses payment for the interpreter, stating:

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ruling in *Xieng v. Peoples Nat'l Bank*, 120 Wn.2d 512, 844 P.2d 389 (1993) (“Accent and national origin are obviously inextricably intertwined in many cases.”)

<sup>21</sup> The Department’s assertions about added cost are unsupported by any actual or estimated cost figures, by any testimony, or by any other proof. Common sense tells us that once the basic forms are translated into Bosnian, the cost of providing notices and orders in Bosnian (and virtually any other language) would be miniscule.

In all legal proceedings in which the non-English-speaking person is a party. . . , the cost of providing the interpreter shall be borne by the governmental body initiating the legal proceedings.

The Court of Appeals I ruled these statutes did not require the Department to appoint or pay for interpreters here, reasoning that agency proceedings adjudicating an injured worker's benefits are not "hearings" and therefore do not meet the statutory definition of "legal proceedings."<sup>22</sup>

The Court also reasoned that Industrial Insurance claims are not initiated by the agency, but rather by the injured worker. Petitioners contend the statutory definition of "legal proceeding" encompasses Department claims adjudications determining the right to benefits. When so construed, the statutory definition reads as follows: " 'Legal proceeding' means a proceeding in any court in this state...or before an administrative board, commission agency, or licensing body of the state...." Such a construction is no less grammatical than the construction urged by the Department.

As for the initiation of the proceeding, employers are required by statute to report all on-the-job injuries, following which the Department

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<sup>22</sup> The Court of Appeals relied on the "last antecedent rule" to support its conclusion that only "hearings" before an agency qualified. In so doing, Division I disregarded this Court's interpretation of the "last antecedent" rule: "But the rule further provides that 'the presence of a comma before the qualifying phrase is evidence the qualifier is intended to apply to *all antecedents* instead of only the immediately preceding one.'" *Berrocal v. Fernandez*, 155 Wn. 2d 585, 593, 121 P.3d 82 (2005). The phrase in which "agency" is found is preceded by a comma, thus indicating it is not intended to be read in conjunction with the immediately preceding phrase, referring to "hearings."

must conduct an investigation. RCW 51.04.020. As a first step in its investigation, the Department sends the injured worker a form requiring the worker to provide a written statement describing the incident and the resulting injuries, signed *under penalty of perjury*.<sup>23</sup> Since the Act's statute mandates that the agency initiate the proceeding, interpreter costs are properly borne by the agency, as required by RCW 2.43.040.

**E. THE BOARD'S OWN RULES REQUIRE REIMBURSEMENT OF INTERPRETER EXPENSES INCURRED BY THESE WORKERS FOR ALL STAGES OF APPEAL PROCEEDINGS AT THE BOARD.**

WAC 263-12-097(1) authorizes an industrial appeals judge to appoint an interpreter to assist an LEP party "throughout the proceeding."

WAC 263-12-097(4) provides that once it is determined that interpretive services are needed, the Board will pay the interpreter fees and expenses.

In pertinent part, the rule states:

(1) When an impaired person as defined in chapter 2.42 RCW or a non-English-speaking person as defined in chapter 2.43 RCW is a party or witness in a hearing before the board . . . , the industrial appeals judge may appoint an interpreter to assist the party or witness throughout the proceeding. . . .

(4) The board . . . will pay interpreter fees and expenses when the industrial appeals judge has determined the need for interpretive services as set forth in subsection (1).

It is undisputed that for each petitioner, an industrial appeals judge

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<sup>23</sup> The Department serves as a law enforcement authority. For example, it may use the information from an injury investigation not only to establish time loss benefits, but also to report on fraud as required under RCW 43.22.331, to issue WSHA citations under RCW 49.17.130, to require reimbursement of benefits paid to the worker, etc.

determined there was a need for interpretive services. Under the foregoing rule, therefore, an interpreter should have been provided, at the Board's expense, to assist each petitioner "throughout the proceeding."

Note that the WAC 263-12-097(1) distinguishes between "a hearing" and "the proceeding." Such a distinction is properly made, because it is well understood that a "hearing" is but one phase of a judicial "proceeding."<sup>24</sup> A "proceeding" is ordinarily understood to encompass a wide range of activities carried out in connection with an action to assert a right or seek redress of a wrong. This Court has held that preparation for trial is "part of a judicial proceeding." *Twelker v. Shannon & Wilson*, 88 Wn. 2d 473, 477, 564 P. 2d 1131 (1977). Even steps taken in preparation for commencing an action, including attorney-client discussions, are "a necessary and legitimate part of a judicial proceeding." *Dice v. City of Montesano*, 131 Wn. App. 675, 692-693, 149 P.3<sup>rd</sup> 1253 (2006).

Based on the foregoing, once the industrial appeals judge determines the injured worker is entitled to interpreter services "throughout the proceeding," those services cannot properly be restricted to the hearing itself. Rather, the services must be provided, at Board expense, to assist the worker in all matters legitimately connected with the appeal

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<sup>24</sup> The Board is a quasi-judicial body, and its functions are essentially judicial. *Floyd v. Dep't of Labor & Indus.*, 44 Wn. 2d 560, 574-575, 578, 269 P.2d 563 (1954) ("We hold that the board of industrial insurance appeals operating pursuant to chapter 225, Laws of 1951, performs an essentially judicial function.")

proceeding. Those matters obviously encompass preparation for the hearing, including unlimited discussions with his or her attorney, participation in discovery<sup>25</sup>, and testimony perpetuated by deposition.

**F. PETITIONERS WERE PREJUDICED BY THE BOARD'S FAILURE TO PROVIDE FULL INTERPRETER SERVICES AT HEARING AND ARE ENTITLED TO REVERSAL FOR FULLY INTERPRETED HEARINGS AND REIMBURSEMENT FOR THEIR INTERPRETER COSTS.**

Citing RCW 2.43.030 and WAC 263-12-097, the Court of Appeals in *Kustura* held when Board elects to provide interpreter services at its expense, it “may not prevent the interpreter from translating whenever necessary to assist the claimant during the hearing.” It then further said:

But by not providing an interpreter for all other witnesses at Kustura’s hearing or for communications with counsel during any of the hearings, the Board failed to comply with the statute’s directive or its own regulations which required it to provide an interpreter to assist the workers “throughout the proceedings.”

While correctly ruling the Board failed to provide required full interpreter services, the Court of Appeals ruled that because they were not prejudiced by the Board’s failure to comply with the law, the workers were entitled to neither new hearings nor reimbursement.<sup>26</sup> This ruling should be reversed.

The Court of Appeals held incorrectly that reversal was only appropriate with proof that a different outcome on the issues would have occurred with full interpretation at hearing. Abuse of discretion is the

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<sup>25</sup> With full interpretation, Petitioners would not have hired interpreters to respond in discovery in English, Mašić’s \$480 interpreter fees to correct his deposition transcript and Resulović’s \$180 interpreter fees to respond to Department requests for admission.



standard for review of a hearings officer's appointment and use of an interpreter. *State v. Gonzales-Morales*, 138 Wn.2d 374, 381, 979 P.2d 826 (1999). Despite finding denial of full hearing interpretation violated RCW 2.43, the Court of Appeals held the workers failed to demonstrate *actual* prejudice from that denial. Because they were denied the ability to understand the proceedings and communicate with counsel, the workers were deprived of their rights under RCW 2.43 and WAC 263-12-097(1), and the constitutional due process rights to be present at hearings, to representation by counsel, and to cross examine witnesses.

The failure to provide full interpretation does not fall within the definition of "harmless error" not requiring reversal. "Harmless error" is that which is "trivial, or formal, or merely academic and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the outcome of the case." *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). The error in these workers' cases was pervasive, prejudicial to their substantial rights under RCW 2.43 and WAC 263-12-097(1) to understand and to participate in hearings, resulting in fundamental unfairness. Respondents did not and cannot prove that the outcome was in no way affected. Where there was no opportunity to understand the testimony or the proceedings, it is impossible to determine

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<sup>26</sup> The Court of Appeals referred to its *Kustura* ruling when rejecting the workers' claims for reimbursement of interpreter expenses in the other cases now before this Court.

that Petitioners could not have assisted counsel in identifying factual errors, in cross-examining witnesses, and in providing their own testimony. Thus denial of full interpretation requires reversal and remand.

Additionally, it is ordinarily deemed “prejudicial” to cause a party to incur unnecessary expenses. See *Steele v. Lundgren*, 85 Wn. App. 845, 859, 935 P.2d 671 (1997). Petitioners’ expenditures for interpreters would have been unnecessary had the Board complied with the law.

By failing to require reimbursement to these workers, the Court’s ruling approves the shifting of interpreter expenses to LEP injured workers, thus both effectively reducing their benefits under the Act and imposing on them burdens not also borne by other injured workers. Such a result is inconsistent with legislative intent and with previous rulings of this Court. See *Brand v. Dep’t of Labor & Indus.*, 139 Wn.2d 659, 989 P.2d 1111 (1999), wherein the Court stated: “There is nothing to indicate that the framers of the benefit rates included any padding to take care of legal and other expenses incurred in obtaining the award.”

**G. THE BOARD IS REQUIRED TO PROVIDE AND PAY FOR FULL INTERPRETATION SERVICES TO LEP WORKERS ON APPEAL.**

The Court of Appeals ruled that RCW 2.43.040 and WAC 263-12-097 do not require the Board to pay for interpretation services to LEP workers, but having decided to provide such services it should have

provided them throughout the proceedings. This construction deprives LEP workers of equal protection of the law.

Were these workers suffering from a hearing impairment, they would be entitled to full interpretation services. RCW 2.42.120 states:

(1) If a hearing impaired person is a party or witness ***at any stage of a judicial or quasi-judicial proceeding in the state or in a political subdivision***, including but not limited to civil and criminal court proceedings, grand jury proceedings, proceedings before a magistrate, juvenile proceedings, adoption proceedings, mental health commitment proceedings, and any proceeding in which a hearing impaired person may be subject to confinement or criminal sanction, ***the appointing authority shall appoint and pay for a qualified interpreter to interpret the proceedings.*** (Emphasis added)

This Court has already determined that the Board “performs an essentially judicial function.” See *Floyd, supra*, at 578. Hence, Board proceedings must be judicial or quasi-judicial in nature. Accordingly, under RCW 2.42.120, a hearing-impaired party to a Board appeal is entitled to a free qualified interpreter to interpret the proceedings. Yet, under the ruling by the Court of Appeals in *Kustura*, an LEP party to a Board appeal is not entitled to a free qualified interpreter on appeal.

It has already been determined that there is no rational basis for treating LEP persons differently from persons who are hearing impaired insofar as interpretation services are concerned. In *State v. Marintorres*, 93 Wn.App. 442, 451-52, 969 P.2d 501 (1999), the court held that a criminal defendant who is required to pay for interpretation in a judicial

proceeding is denied equal protection of the law, because under RCW 2.42.120 a hearing-impaired person similarly situated would be entitled to such services at no cost. *Marintorres* held that because the Legislative intent was the same in RCW 2.42 and RCW 2.43, the qualified interpreter services provided under both statutes should be the same.<sup>27</sup>

There is no good reason to find unequal treatment is impermissible in a criminal case as in *Marintorres*, yet is permissible in a Board appeal. Though the LEP worker's freedom is not at stake in a Board proceeding, his or her means of economic survival hangs in the balance. Accordingly, these injured workers are entitled to equal protection of the law, just as *Marintorres* was. Equal protection requires that LEP workers be afforded the same free qualified interpreter services in judicial and quasi-judicial proceedings, as is afforded to hearing-impaired persons under RCW 2.42.

#### **H. PUBLIC POLICY SUPPORTS PETITIONERS.**

In authorizing the appointment of interpreters to assist LEP persons in legal proceedings, our Legislature expressly declared that it is the policy of this state to "secure the rights" of those "unable to readily understand or communicate in the English language...." RCW 2.42.010.

This Court has also expressed its policy of assuring equal access to justice for all and appointed a task force that produced the *Washington Civil Legal Needs Study* (2003). One of the findings of this study at p. 48

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<sup>27</sup> Just as WAC 263-12-097 treats persons with communication disabilities the same.

is that “language barriers” are a significant contributor to the failure of low income people to seek the assistance of an attorney. The Washington State Bar Association has adopted a policy on equal access to justice, stating the fundamental principle in *Ensuring Equal Access for People with Disabilities: A Guide for Washington Courts*, (2006), p. 1:

When justice is inaccessible, the simple result is injustice. The need to eliminate barriers preventing access to our courts is real and immediate.

The Bar also endorsed equal access to justice, stating at pp. 3 & 13, courts must “remove barriers and/or provide reasonable accommodations” and that administrative agencies should also provide such accommodations.

The federal government has also declared its policy to assure that LEP persons have access to all federally assisted programs. In 2000, the President of the United States signed **Executive Order No. 13166**, stating that federally assisted programs are required to “ensure that the programs and activities they normally provide in English are accessible to LEP persons and thus do not discriminate on the basis of national origin in violation of Title VI of the Civil Rights Act of 1964.”<sup>28</sup>

The Nation and the State have both stated that discrimination based on national origin is against public policy in employment, including employment benefits, and in public programs and facilities. 42 USC §2000(d) & (e); RCW 49.60.030; RCW 49.60.030(a) & (b). Industrial

Insurance, a federally supported program providing employment benefits, is squarely within the ambit of all these antidiscrimination provisions. See **APPENDIX C**, detailing Department Federal Funding 1997 to 2007.

In short, the public policies of our state and of our federal government assure that LEP persons have no communication barriers in securing their legal rights, including their Industrial Insurance benefits.

With all due respect, the Court of Appeals' decisions are not in harmony with the foregoing policies, but instead are sharply at odds with them. These decisions do not promote equal access to justice for LEP workers injured on the job, but instead make it more difficult for them to secure the rights to which they are entitled under the Act, diminishing the amount of benefits intended to support them and their families below the scheduled amount by thousands of dollars of interpreter fees. Unless this Court reverses these Court of Appeals decisions, LEP workers will continue being penalized solely because of their national origin.

**I. LEP WORKERS RECEIVING ENGLISH-ONLY ORDERS ARE ENTITLED TO EQUITABLE RELIEF FROM THE 60-DAY BOARD APPEAL PERIOD.**

In *Rodriguez v. Dep't of Labor & Indus.*, 85 Wn.2d 949, 540 P.2d 1359 (1975), a Spanish-speaking LEP worker appealed a Department order more than 60 days after issuance. The Court stated the issues at 952:

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<sup>28</sup> It is undisputed that the Department receives federal funds. **APPENDIX C**.

(1) [W]hether appellant's notice of appeal was filed within the time limits prescribed in RCW 51.52.060 and, (2) if not, whether appellant's extreme illiteracy excused the untimely filing.

The Court held that equity required waiver of the strict application of the 60-day period in light of inability to understand English. The Court noted that the Department knew or should have known and would not be substantially prejudiced by allowing the appeal, saying at 955:

A report of the accidental injuries was made . . . in a timely fashion, a full investigation thereof was conducted by the department, the claim was allowed and payments made thereon. No substantial prejudice will result to the department or the board from allowing appellant workman's appeal from the order closing his claim. Further, it is clear appellant was extremely illiterate and himself unable to ascertain or understand the nature and contents of the order communicated and the department knew or should have known of appellant's illiteracy at the time it closed his claim.

Petitioners are effectively illiterate in English as well. The Board recognized this by appointing interpreters for parts of their hearings. Also, as in *Rodriguez*, there is no prejudice to the Department in allowing these appeals. More importantly, *Rodriguez* was decided before and with no consideration of Washington State's multiple expressions of public policy against discrimination based on national origin.

The Court of Appeals found lack of English literacy insufficient to apply equity, imposing additional requirements, effectively modifying *Rodriguez* and ignoring the federal and state public policies to prevent discrimination based on national origin. For this reason, Lukić's, Mašić's,

Memišević's and Resulović's cases should be found timely, as Ferencák's was, and remanded for hearings on the merits.

#### **V. ATTORNEY'S FEES & COSTS**

Petitioners request attorney fees and costs pursuant to RCW 51.52.130, construed by this Court in *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 989 P.2d 1111 (1999) as that prevailing on any issue on appeal under the Act entitles the worker to attorney fees on all issues.

#### **VI. CONCLUSION**

Petitioners request the following relief that:

1. All the Court of Appeals decisions be reversed and remanded for fully interpreted proceedings for failures of due process, of equal protection, and noncompliance with RCW 2.43 and WAC 263-12-097.
2. The Board's decisions finding Lukić, Mašić, Memišević, and Resulović appeals untimely be reversed, found timely, and, with the timely Ferencák, Kustura, and Meštrovac appeals, be remanded for new, fully-interpreted hearings on the merits.
3. The Department be ordered to provide free interpreter services to LEP workers during all phases of claim adjudication to communicate about their injuries and claims with the Department, employers, health care providers, vocational providers, and attorneys.
4. The Department be ordered to reimburse petitioners, with 12% interest under RCW 51.52.135, for their interpreter expenses during



Department claim processing, including, without limitation, all such fees incurred to communicate on their injuries and claims with the Department, employer, health care providers, vocational providers and attorneys.

5. The Board be ordered to provide interpreter services to petitioners for additional Board proceedings, including new hearings on the merits for all the petitioners during which the Board provides them interpreter services throughout their appeals, including for preparation and discovery before hearing, for confidential communications with counsel during all proceedings, including evidentiary hearings, for decision making, and for any further Court appeals.

6. The Board be ordered to reimburse all petitioners, with 12% interest under RCW 51.52.135, for their interpreter expenses incurred after the filing of the Board appeals, including during Board proceedings, which shall be deemed to include, without limitation, all interpreter fees related to discovery, attorney-client communications to prepare for and during the hearings, as well as all other communications reasonably associated with Board proceedings and further Court appeals.

7. Petitioners be awarded their costs and reasonable attorneys fees under RCW 51.52.130, as construed in **Brand**, against respondents.

Respectfully submitted this 6<sup>th</sup> day of April, 2009.



Ann Pearl Owen, WSBA #9033, Attorney for Petitioners



# PROVIDER BULLETIN

PB 05-04

## THIS ISSUE

PB 05-04 -  
**Interpretive Services  
Payment Policy  
Effective July 1, 2005**

**TO:**

Ambulatory Surgery Centers,  
Audiologists, Chiropractic Physicians,  
Clinics, Dentists, Drug and Alcohol  
Treatment Centers,  
Freestanding Emergency Rooms,  
Freestanding Surgery Centers,  
Hospitals, Interpretive Services  
Providers, IME Exam Groups,  
Massage Therapists, Naturopathic  
Physicians, Nurses-ARNP,  
Occupational Therapists, Opticians,  
Optometrists, Osteopathic Physicians,  
Pain Clinics, Panel Exam Groups,  
Pharmacists, Physicians, Physician  
Assistants, Physical Therapists,  
Podiatric Physicians, Prosthetists and  
Orthotists, Psychologists, Radiologists,  
Self-Insured Employers, Speech  
Therapists & Pathologists, Vocational  
Counselors

**CONTACT:** Provider Hotline  
1-800-848-0811

From Olympia 902-6500  
Loris Gies: PO Box 4322  
Olympia, WA 98504-4322  
(360) 902-5161

After July 1, 2005:  
Karen Jost PO Box 4322  
Olympia, WA 98504-4322  
360-902-6803  
Fax (360) 902-4249

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## Purpose

This Provider Bulletin updates coverage and payment policies for interpretive services as required in WACs 296-20-02700 and 296-23-165. **This bulletin replaces Provider Bulletin's 03-01, 03-10 and 05-01.** The purpose of this bulletin is to notify providers and insurers of the following changes:

- Revised coverage and payment policy.
- Interpretive services provider qualifications.
- Revised interpretive services codes and descriptions.
- New fees for interpretive services.
- Limits on interpretive services.
- Verification of interpretive services requirement.

## Interpretive Services for Healthcare and Vocational Services

This policy applies to interpretive services provided for healthcare and vocational services in all geographic locations to injured workers and crime victims (collectively referred to as “insured”) having limited English proficiency or sensory impairments; and receiving benefits from the following insurers:

- The State Fund (L&I),
- Self-Insured Employers or
- The Crime Victims Compensation Program.

**This coverage and payment policy including new fees, codes, service descriptions, limits and provider qualification standards is effective on and after July 1, 2005.**

## Policy Does Not Apply to Interpretive Services for Legal Purposes

This coverage and payment policy does not apply to interpretive services for injured workers or crime victims for legal purposes, including but not limited to:

- Attorney appointments.
- Legal conferences.
- Testimony at the Board of Industrial Insurance Appeals or any court.
- Depositions at any level.

**Payment in these circumstances is the responsibility of the attorney or other requesting party(s).**

## Why Are Interpretive Services Covered?

The United States Department of Health and Human Services Office of Civil Rights concluded that inadequate interpretation for patients with Limited English Proficiency is a form of prohibited discrimination on the basis of national origin under Title VI of the Civil Rights Act of 1964. More information about the Civil Rights Act is available on the web at <http://www.hhs.gov/ocr/lep/>.

The Washington Workers' compensation law under RCW 51.04.030 (1) requires the provision of prompt and efficient care for injured workers without discrimination or favoritism. Therefore, interpretive services are covered so injured workers who have limited English proficiency or sensory impairments may receive prompt and efficient care.

## Information for Healthcare and Vocational Providers

Insured individuals with limited English proficiency or sensory impairments may need interpretive services in order to effectively communicate with you. Interpretive services do not require prior authorization.

Under the Civil Rights Act, as the healthcare or vocational provider, **you** determine whether effective communication is occurring. If assistance is needed, then **you**:

- Select an interpreter to facilitate communication between you and the insured.
- Determine if an interpreter (whether paid or unpaid) accompanying the insured meets your communication needs.
- May involve the insured in the interpreter selection. **NOTE: Under the Civil Right Act, hearing impaired persons have the right to participate in the interpreter selection.**
- Should be sensitive to the insured's cultural background and gender when selecting an interpreter.

- The healthcare or vocational provider.
- Employee(s) of the healthcare or vocational provider whose primary job is **not** interpretation.
- Employee(s) of the healthcare or vocational provider whose primary job is interpretation but who is not a credentialed interpreter.

### **Persons Ineligible to Provide Interpretation/Translation Services**

Some persons may not provide interpretation or translation services for injured workers or crime victims during healthcare or vocational services delivered for their claim. These persons are:

- The worker's or crime victim's legal or lay representative or employees of the legal or lay representative.
- The employer's legal or lay representative or employees of the employer's legal or lay representative.
- Persons under the age of eighteen (18). **NOTE: Injured workers or crime victims using children for interpretation purposes should be advised they need to have an adult provide these services.**

### **Persons Ineligible to Provide Interpretation/Translation Services at IME's**

Under WAC 296-23-362 (3), "The worker may not bring an interpreter to the examination. If interpretive services are needed, the department or self-insurer will provide an interpreter." Therefore, at Independent Medical Examinations (IME), persons (including approved interpreter/translator providers) who may **not** provide interpretation or translation services for injured workers or crime victims are:

- Those related to the injured worker or crime victim.
- Those with an existing personal relationship with the injured worker or crime victim.
- The worker's or crime victim's legal or lay representative or their employees.
- The employer's legal or lay representative or their employees.
- Any person who could not be an impartial and independent witness.
- Persons under the age of eighteen (18).

### **Hospitals and Other Facilities May Have Additional Requirements**

Hospitals, free-standing surgery and emergency centers, nursing homes and other facilities may have additional requirements for persons providing services within the facility. For example, a facility may require all persons delivering services to have a criminal background check, even if the provider is not a contractor or employee of the facility. The facility is responsible for notifying the interpretive services provider of their additional requirements and managing compliance with the facilities' requirements.

## **Fees, Codes and Limits**

### **Why Is the Department Restructuring Fees and Codes?**

A recent coverage and payment policy review showed the department's coding structure was not in line with interpreters' usual business practices. Therefore, the department decided the use of a single code for all payable services would work better for everyone. However, the department wanted to identify group services. So now there are two comprehensive codes for interpretive services—one for use with an *individual* client and one for use with multiple clients (*group*) at the same appointment.

In addition, the project's fee research showed the department was paying more than most other Washington State payers, who are paying between \$30 and \$50 per hour. The new coding structure includes all services; some of which the department had paid previously paid at \$30 per hour. The fee reduction takes into account the increased billing at full rate for all covered service time.

By law, the department has a responsibility to control benefits costs for the employers and injured workers who pay the workers' compensation insurance premiums.

Code	Description	How to Bill	Maximum Fee	L&I Code Limits
9988M	<b>Group interpretation</b> direct services time between two or more client(s) and healthcare or vocational provider, includes wait and form completion time, time divided between all clients participating in group, <b>per minute</b>	1 minute equals 1 unit of service	\$0.80 per minute	Limited to 480 minutes per day.  Does not require prior authorization.
9989M	<b>Individual interpretation</b> direct services time between one insured client and healthcare or vocational provider, includes wait and form completion time, <b>per minute</b>	1 minute equals 1 unit of service	\$0.80 per minute	Limited to 480 minutes per day.  Does not require prior authorization.
9986M	<b>Mileage, per mile</b>	1 mile equals 1 unit of service	State employee reimbursement rate (as of January 1, 2005 rate is 40.5¢ per mile)	Does not require prior authorization.  Mileage billed over 200 miles per claim per day will be reviewed.
9996M	<b>Interpreter "IME no show"</b> wait time when insured does not attend the insurer requested IME, <b>flat fee</b>	Bill 1 unit only	Flat fee \$48	Payment requires prior authorization -Contact Central Scheduling Unit after no show occurs. Contact number: 206-515-2799.  Only 1 no show per claimant per day.
9997M	<b>Document translation</b> at insurer request	1 page equals 1 unit of service	BR	Requires prior authorization, which will be on translation request packet. Services over \$500 per claim will be reviewed.

## **Covered and Non-covered Services**

### *Covered Services*

The following interpretive services are covered. When billed, payment is dependent upon service limits and department policy. Interpretive services providers may bill the insurer for:

- Interpretive services which facilitate communication between the insured and a healthcare or vocational provider.
- Time spent waiting for an appointment that does not begin at time scheduled (when no other billable services are being delivered during the wait time).
- Assisting the insured to complete forms required by the insurer and/or healthcare or vocational provider.
- A flat fee for an insurer requested IME appointment when the insured does not attend.
- Translating document(s) at the insurer's request.
- Miles driven from a point of origin to a destination point and return.

### *Non-covered Services*

The following services are not covered and may not be billed to nor will they be paid by the insurer:

- Services provided for a denied or closed claim (except services associated with the initial visit for an injury or crime victim or the visit for insured's application to reopen a claim).
- Missed appointment for any service other than an insurer requested IME.
- Personal assistance on behalf of the insured such as scheduling appointments, translating correspondence or making phone calls.
- Document translation requested by anyone other than the insurer, including the insured.
- Services provided for communication between the insured and an attorney or lay worker legal representative.
- Services provided for communication not related to the insured's communications with healthcare or vocational providers.
- Travel time and travel related expenses, such as meals, parking, lodging, etc.
- Overhead costs, such as phone calls, photocopying and preparation of bills.

## **Interpreter Organizations**

Several interpreter and translator professional organizations have information and educational opportunities for interpretive services providers. Their websites are listed below. This list is neither comprehensive nor an endorsement of any of these organizations. It is provided for informational purposes.

Organization	Website	Phone
Northwest Translators and Interpreters Society	<a href="http://www.notisnet.org">www.notisnet.org</a>	206-382-5642
Society Of Medical Interpreters	<a href="http://www.sominet.org">www.sominet.org</a>	206-729-2100
National Association of Judiciary Interpreters and Translators	<a href="http://www.najit.org">www.najit.org</a>	206-267-2300
Washington Interpreters and Translators Society	<a href="http://www.witsnet.org">www.witsnet.org</a>	206-382-5690
Washington State Registry of Interpreters for the Deaf	<a href="http://www.wsrid.com">www.wsrid.com</a>	No number listed
National Council on Interpreting in Healthcare	<a href="http://www.ncihc.org">www.ncihc.org</a>	FAX 707-541-0437

## **L&I Publications**

L&I publishes several handbooks and pamphlets related to the Workers' Compensation and Crime Victims Program. Some of them are available in Spanish and other languages.

Provider related publications can be downloaded or ordered at

<http://www.LNI.wa.gov/ClaimsIns/Providers/FormPub/Pubs/default.asp>

Workers' compensation related publications can be downloaded or ordered at

<http://www.LNI.wa.gov/ClaimsIns/Claims/FormPub/Pubs/default.asp>

Crime Victims Program related publications can be downloaded or ordered at

<http://www.LNI.wa.gov/ClaimsIns/CrimeVictims/FormPub/default.asp>

## **Laws and Rules Relating to Interpretive Services**

The following laws and rules contain relevant information for interpretive services providers and can be accessed at the Washington State Legislature's website <http://www1.leg.wa.gov/LawsAndAgencyRules/>. Links to these laws and rules are located at the L&I home page <http://www.LNI.wa.gov/>.

RCW Chapter 5.60	Witnesses—Competency
RCW 2.43.010	Right to Interpreter Services in Legal Proceedings
RCW 51.04.030 (1)	Medical Aid Rules
RCW 51.28.030	Medical Aid Fund
WAC 296-20-010	General Rules
WAC 296-20-01002	Definitions
WAC 296-20-015	Who may treat
WAC 296-20-02010	Review of Health Services Providers
WAC 296-20-022	Out of State Providers
WAC 296-20-02700	Medical Coverage Decisions
WAC 296-20-124	Rejected and Closed Claims
WAC 296-20-097	Reopenings
WAC 296-23-165(3)	Miscellaneous Services
WAC 296-23-362	May a worker bring someone with them to an Independent Medical Examination (IME)?
GR 11.1	Code of Conduct for Court Interpreters
RCW Chapter 5.60	Witnesses



# PROVIDER BULLETIN

PB 03-0

## THIS ISSUE

### Interpreter Services

#### TO:

Audiologists  
Chiropractic Physicians  
Clinics  
Dentists  
Freestanding Emergency Rooms  
Freestanding Surgery  
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Panel Exam Groups  
Pharmacists  
Physical Therapists  
Podiatric Physicians  
Prosthetists & Orthotists  
Psychologists  
Radiologists  
Self Insured Employers  
Speech Pathologists  
Vocational Counselors

#### CONTACT:

Provider Toll Free  
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[http://www.lni.wa.gov/hsa/hsa\\_pbs.htm](http://www.lni.wa.gov/hsa/hsa_pbs.htm)

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## Purpose

This Provider Bulletin updates payment policies and fee schedules for interpreter services. This bulletin replaces Provider Bulletin 99-09 and the section titled "Interpreter Services" from the "Professional Services" chapt of the July 1, 2002 *Medical Aid Rules and Fee Schedules*. It applies to interpretive services provided to injured workers or crime victims who have limited English language abilities or sensory impairments receiving benefit from:

- The State Fund
- Self insured employers and
- The Crime Victims' Compensation Program.

This policy is effective for dates of service on or after March 1, 2003.

## What Is Changing?

- Clarification of the record documentation that must be kept by each interpreter.
- Interpretive services will be paid per minute. It is the department's expectations that an interpreter's workday will generally not exceed hours per day. This expectation is based on the assumption that an interpreter needs to be alert and attentive to provide the highest quality of professionalism and accuracy in their work. Any billed interpreter time that exceeds 8 hours in a workday will be the basis for pre and post payment review.

Board of  
Industrial Insurance A  
In re: MEMISPER  
Docket No. 0311512  
Exhibit No. 27  
☒ 12/11/03  
ADM. Date

- Mileage is paid point to point from the first mile. Over 50 miles billed per single claimant or 75 miles for multiple claimants will be a basis for department review.
- The maximum wait time is increased to 60 units (60 minutes) per day per interpreter. If wait time exceeds 60 minutes it will be a basis for pre and post payment review.
- The fee for wait time will now be one half (1/2) of the regular oral interpretation fee in order to be consistent with the department's other fee schedules.

## **Definitions**

### *Claimant*

Injured workers covered by the State Fund or self-insured employers (or their third party administrators), and victims of crime covered by the Department of Labor and Industries' Crime Victims' Compensation program.

### *Department*

In this publication, this term refers to the Department of Labor and Industries including the State Fund, self-insured employers or their third party administrators, and/or the Crime Victims' Compensation program.

### *Interpretation*

The oral or manual transfer of a message from one language to another language.

### *Interpreter Services*

Providing interpretation between injured workers and health care or vocational service providers.

### *Interpreter Service Time*

Direct service time that:

- Begins when the worker(s) goes into the exam room or other place where direct health services are provided (e.g., vocational provider's office, lab, physical therapy room, pharmacy).
- Ends when the worker(s) completes the appointment.
- Does not include travel time to the initial appointment and travel time after the completed services.

### *Insurer*

Refers to the department (Department of Labor and Industries), the self-insured employer (or their third party administrator), or the Crime Victims' Compensation program.

### *Source Language*

The language from which an interpretation and/or translation is rendered.

### *Target Language*

The language into which an interpretation and/or translation is rendered.

### *Translation*

The written transfer of a message from one language to another.



The interpreter must not accept an assignment that requires knowledge or skills beyond his or her competence.

#### *Maintenance of Role Boundaries*

Interpreters must not engage in any other activities that may be thought of as a service other than interpreting, such as phoning claimants directly.

#### *Responsibilities Toward the Claimant and Provider*

The interpreter must ensure that all parties understand the interpreter's role and obligations. The interpreter must:

- Inform all parties that everything said during the appointment will be interpreted and that they should not say anything that they don't want interpreted.
- Inform all parties that they will respect the confidentiality of the claimant.
- Inform all parties that they are obligated to remain neutral.
- Disclose any relationship with any party that may influence or someone may perceive to influence the interpreter's impartiality.
- Accurately and completely represent their certification, training and experience to all parties.

### **Who May Interpret**

#### *Who is eligible to interpret for health care and vocational services?*

To serve as an interpreter for health care treatment, independent medical examinations (IME) or other medical or vocational evaluations requested by the insurer, interpreters must meet the following criteria:

- The interpreter must be fluent in English and in the claimant's language, including fluency in medical terminology for both languages.
- The interpreter must NOT be an attorney, an employee of a law firm or an agent of an injured worker's employer of injury.
- An interpreter for an Independent Medical Exam (IME) must NOT have an existing family or personal relationship with the claimant.
- An interpreter for an insurer requested IME must be an impartial and independent translator qualified to be a witness under RCW 5.60 et seq.
- The interpreter must have an active L&I provider account number.

### **Who Is Eligible to be Paid**

#### *Who is eligible to be paid for interpretive services?*

To be eligible for payment, the interpreter must meet the following criteria:

- Meet the requirements defined above in "Who is eligible to interpret for health care and vocational services?"

AND

- Have an active L&I provider account.

An interpreter is NOT eligible for payment if he/she:

- Has an existing family or personal relationship with the claimant.
- Is the medical, health care or vocational provider.
- Is an employee of the provider serving the claimant and his/her primary job function is not interpreting

## Who May Request and Select Interpreter Services

*Who may request interpretive services and select an interpreter?*

Any person may request interpretive services on behalf of a claimant. However, before authorizing interpretive services, the claim manager must verify the claimant's need based on information from the health care or vocational provider.

The requesting party or insurer may select and request services from an eligible interpreter as defined above in "Who is eligible to interpret for health care and vocational services?"

## Obtaining Authorization

*Authorization requirements*

### *Initial Visit*

Authorization is not required for the claimant's initial visit. The insurer will pay for interpretive services needed during the initial visit regardless of whether the claim is later allowed or denied. This initial visit includes interpretive services needed to obtain accident or medical history information or to fill out the appropriate State Fund or self-insured forms.

### *Other Services Prior to Claim Allowance*

When interpretive services are required for additional visits prior to claim allowance, the provider may request the services of an eligible interpreter. The insurer **will not** pay for these services prior to claim allowance. If the claim is later allowed, the insurer will decide whether to authorize and pay for interpretive services.

Only interpreters may bill the department for interpretive services. The health care provider, injured worker or other party may pay for interpretive services provided prior to claim allowance. If the claim is later allowed and an interpreter has received payment from someone other than the insurer, the interpreter must refund in full all payment received from the other party and accept the department's maximum payment as full and complete payment. If the insurer does not allow the claim, or determines interpretive services are not necessary, the person requesting the services is responsible for the bill.

### *Services for Open Claims*

Prior authorization is required for interpretive services for open claims. Before authorizing interpretive services, the insurer must verify the claimant's need based on information from the health care or vocational provider. Once authorized, interpretive services do not need repeat authorization. Interpreters are responsible for verifying the status of the claim and that the insurer has authorized interpretive services.

For an Independent Medical Exam (IME), the insurer will automatically authorize interpretive service when the need is evident from the claimant's file.

### *Reopening a claim*

If a worker applies to reopen a claim, the insurer will initially pay only for interpretive services related to completing and submitting the reopening application.

Additional interpretive services provided while the insurer is determining whether to reopen the claim will be treated in the same manner as services described above in "Other Services Prior to Claim Allowance." No prior authorization is needed.

### **Charges Billed to the Insurer**

Interpreters must bill their usual and customary fees when interpreting for injured workers or crime victims. The insurer will pay the lesser of the interpreter's usual and customary fee, or the fee schedule maximum (See WAC 296-20-010(2)).

### **Services Billed to the Insurer**

#### *Covered Services*

The following interpretive services are covered and may be billed to the insurer. Payment is dependent on authorization requirements, service limits and department policy.

Interpreters may bill the insurer for:

- Interpretive services providing language communication between the claimant and a health care or vocational provider.
- Time spent waiting for an appointment that does not begin at its scheduled time (when no other billable services are provided during the wait time).
- Time spent assisting a claimant with the completion of an insurer form.
- Time spent waiting when a worker does not show up for an insurer requested Independent Medical Exam (IME).
- Time spent translating a document at the request of the insurer.
- Miles driven from a point of origin to a destination point and return.

#### *Services Not Covered*

The following services are not covered and may not be billed to the insurer:

- Services provided for a denied or closed claim (except for services provided for a claimant's initial visit or for the services associated with a claimant's application to reopen a claim).
- Time spent waiting for an appointment that does not begin at its scheduled time if other billable services are performed during the wait time (e.g. document translation or assisting a claimant with form completion).
- Missed appointments for any service except an insurer requested Independent Medical Exam (IME).
- Personal assistance on behalf of the claimant such as scheduling appointments, translating correspondence, or making phone calls.
- Document translation requested by anyone other than the insurer, including the injured worker.
- Interpretive services provided for communication between an attorney or worker representative and the claimant.
- Travel time and travel related expenses, such as meals. (Some mileage is payable as noted in other sections of this bulletin.)
- Overhead costs, such as for photocopying and preparation of billing forms.

### **Billing Codes**

Interpreters should bill the following codes for interpretive services provided on or after 03-01-03. Interpreter time that exceeds 8 hours in a workday will be a basis for pre and post payment review. The 8-hour threshold applies to the combined total of all interpretive services paid per minute (9989M, 9990M, 9991M, 9996M, and 9997M).

## Resources

### *Laws and Rules Relating to Interpretive Services*

The following laws and rules contain information relevant for interpreters and can be accessed at the Washington State Legislature's web site. Links to these laws and rules are located on the department's Provider Information home page at [www.lni.wa.gov/hsa](http://www.lni.wa.gov/hsa).

RCW Chapter 5.60	Witnesses – Competency
WAC 296-20-010	General Rules
WAC 296-20-01002	Definitions
WAC 296-20-015	Who May Treat
WAC 296-20-02010	Review of Health Services Providers
WAC 296-20-022	Out of State Providers
WAC 296-20-124	Rejected and Closed Claims
WAC 296-20-097	Reopenings
WAC 296-23-165(3)	Miscellaneous Services
WAC 296-23-255	Conditions for Accompaniment

### *Self-Insured Employer Lists*

The address list for self-insured employers is available on the department's web site. To access the list, go to the department's main page at [www.lni.wa.gov](http://www.lni.wa.gov) and select "Self-Insured Employer Lists" from the drop down menu list. The address list may also be requested by calling (360) 902-6860.

**Federal Funds Received by Department of Labor & Industries  
& by Washington's Industrial Insurance Program**

**1997-2007**

<b>Biennium</b>	<b>Total Federal Funds In DLI Budget</b>	<b>Federal Funds in Accident Account</b>	<b>Federal Funds in Medical Aid Account</b>	<b>ESSB Reference</b>
<b>1997-1999</b>	<b>\$16,706,000</b>	<b>\$9,112,000</b>	<b>\$1,592,000</b>	<b>6062 § 218</b>
<b>1999-2001</b>	<b>\$16,654,000</b>	<b>\$9,112,000</b>	<b>\$1,592,000</b>	<b>5180 § 217</b>
<b>2001-2003</b>	<b>\$20,956,000</b>	<b>\$11,568,000</b>	<b>\$2,438,000</b>	<b>6153 § 217</b>
<b>2003-2005</b>	<b>\$24,818,000</b>	<b>\$13,396,000</b>	<b>\$2,960,000</b>	<b>5404 § 217</b>
<b>2005-2007</b>	<b>\$26,806,000</b>	<b>\$13,621,000</b>	<b>\$3,185,000</b>	<b>6090 §217</b>
<b>Total</b>	<b>\$105,940,000</b>	<b>\$56,809,000</b>	<b>\$11,767,000</b>	

**APPENDIX C**